No. 94-866

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HWESU S. MURRAY,

Petitioner,

—against—

NATIONAL BROADCASTING COMPANY, INC.
and BRANDON TARTIKOFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the court below erred in reviewing the district court's denial of Rule 60(b) relief under an "abuse of discretion" standard?

(2) Whether the court below erred in deciding that, where the federal courts have reasonably interpreted state law and a subsequent state court decision arguably calls that interpretation into question, a litigant is not entitled to relief under Fed. R. Civ. P. 60(b)?

(3) Whether the court below erred in adjudicating petitioner's appeal when the third judge assigned to the panel recused himself immediately prior to oral argument?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents National Broadcasting Company, Inc. ("NBC")[1] and Brandon Tartikoff ("Tartikoff") respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 16, 1994 (rehearing and rehearing *en banc* denied, August 12, 1994) should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and because the decision below is in all respects correct.

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[1] Pursuant to Supreme Court Rule 29.1, Respondent NBC advises the Court that it is a wholly-owned subsidiary of the General Electric Company Inc. ("GE"), a publicly-owned corporation. NBC has no subsidiaries or affiliates other than wholly-owned subsidiaries.

STATEMENT OF THE CASE

Nature of the Action

Ten years ago petitioner Hwesu S. Murray ("Murray"), then an NBC sports division financial manager, instituted an action against NBC and its entertainment division president, Brandon Tartikoff, claiming that they had misappropriated an idea submitted by Murray to NBC personnel in 1980.[2] Murray claimed that four years after he submitted his idea, for a program entitled "Father's Day", it surfaced as the critically acclaimed and financially successful *The Cosby Show*, which was broadcast on the NBC television network. (JA 60, 65-66)[3]

Murray's original complaint, filed in 1984, asserted a variety of claims, including, *inter alia*: (1) misappropriation and conversion of his idea; (2) breach of implied agreement and implied confidential relationship; and (3) unjust enrichment. (JA 74-87) Murray did not claim that NBC had entered into any contractual relationship with him; indeed he alleged that NBC's failure to do so was actionable under 42 U.S.C. § 1981. Murray sought an injunction against broadcast of *The Cosby Show*, a declaration that he owns all rights to it, compensatory and punitive damages and other relief. (JA 86-87)

In July of 1987 the district court granted summary judgment for respondents and dismissed Murray's complaint in its entirety. 671 F. Supp. 236 (Pet. App. L). The court held that the lack of novelty of Murray's alleged "Father's Day" sub-

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[2] The action was also brought against the Carsey-Werner Co. (executive producer and copyright owner of *The Cosby Show*) and its principals, Marcia Carsey and Thomas Werner. (JA 53) This action was dismissed as against the Carsey-Werner Company and its two principals with Murray's consent. (JA 112-13)

[3] References herein to "Pet. at __" are to the Petition for a Writ of Certiorari. References herein to "Pet. App. __" are to the Appendices annexed thereto. References herein to "JA __" are to the Joint Appendix filed in the Court of Appeals for the Second Circuit on the appeal below.

mission precluded any recovery from the defendants. 671 F. Supp. 236 (Pet. App. L at 41-47). In so holding, the court expressly relied on a long line of New York state cases, including the New York Court of Appeals' seminal decision in *Downey* v. *General Foods Corp.*, 286 N.E.2d 257 (N.Y. 1972). 671 F. Supp. at 239 (Pet. App. L at 15-16). The district court concluded that Murray's "Father's Day" proposal was not novel because it merely combined ideas that had existed in the industry for years and because Bill Cosby himself had publicly discussed the possibility of developing a program like *The Cosby Show* over 15 years before Murray's proposal. 671 F. Supp. at 241-42, 244 (Pet. App. L at 24-25). Because the district court held that "Father's Day" was not novel, each of Murray's claims necessarily failed. A judgment of dismissal was entered on July 22, 1987. (Pet. App. K)

In April 1988, the Court of Appeals for the Second Circuit affirmed the district court's holding in an often-cited opinion, 844 F.2d 988 (Pet. App. J), agreeing with the district court's application and analysis of New York law. Like the district court, the Court of Appeals was persuaded that Murray's "Father's Day" proposal was not novel and therefore not protectable under New York law.

The Second Circuit denied Murray's request for rehearing and his suggestion for rehearing *en banc*, no member of the Court having requested that a vote on rehearing be taken. (Pet. App. I) On November 14, 1988, this Court denied Murray's petition for a writ of certiorari. 488 U.S. 955 (Pet. App. H).

Since this Court denied Murray's original petition for a writ of certiorari, Murray has instituted two separate actions before the courts of the State of New York seeking the same relief sought in his original federal litigation. Both of those actions were dismissed by New York's courts as barred by the doctrine of *res judicata*.[4]

[4] In May of 1989, Murray improperly instituted his second action claiming ownership rights to *The Cosby Show* before the New York County Supreme Court. On motion by respondents, the federal district

Murray's Motion Under Rule 60(b)

Six years after final judgment was entered against Murray, the New York Court of Appeals announced its decision in a wholly unrelated case styled *Apfel* v. *Prudential-Bache Securities Inc.*, 616 N.E.2d 1095 (N.Y. 1993) (Pet. App. V). In *Apfel*, plaintiffs sued defendant Prudential-Bache Securities Inc. ("Prudential") for breach of a written contract pursuant to which plaintiffs conveyed to Prudential a group of ideas for issuing and marketing municipal bonds and Prudential agreed to compensate plaintiffs for use of those ideas. *Apfel*, 616 N.E.2d at 1095-96. The contract was negotiated and executed *after* plaintiffs disclosed those ideas to Prudential. Thereafter, Prudential performed and paid plaintiffs under the agreement for more than two years before purporting to terminate the agreement. *Id.* at 1096.

On appeal from the trial court's rulings on various pre-trial motions (as modified by the Appellate Division), the New York Court of Appeals rejected Prudential's argument, based on *Downey* and other decisions (including the Second Circuit's original decision in this case), that plaintiffs' ideas were not novel and, thus, could not constitute consideration for the

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court issued an injunction pursuant to the relitigation exception of the federal Anti-Injunction Act, 28 U.S.C. § 2283 (1988), in order to protect its judgment. 718 F. Supp. 249 (Pet. App. G). The injunction prohibited Murray from relitigating in state court any claims that had actually been litigated before the district court. 718 F. Supp. at 251 (Pet. App. G at 10). Subsequently, the state court made its own determination that so much of the action as remained was barred by the doctrine of *res judicata* and dismissed the complaint. *Murray* v. *National Broadcasting Co.*, 1990 Copyright L. Dec. (CCH) ¶ 26,655 (Sup. Ct. N.Y. Co. 1990), *aff'd*, 576 N.Y.S.2d 578 (App. Div. 1st Dep't 1991), *appeal dismissed*, 594 N.E.2d 936 (N.Y. 1992). Undaunted, Murray filed his third complaint—identical to his second—before the New York Supreme Court, Westchester County. Like his New York County action, this obviously improper attempt to relitigate the district court's judgment was dismissed as barred by the doctrine of *res judicata*. *Murray* v. *National Broadcasting Co.*, No. 8632/92 (Sup. Ct. West. Co. Jan. 25, 1993), *appeal pending*, No. 93-05380 (2d Dep't).

agreement. *Id.* The *Apfel* court declined to review the adequacy of the consideration for the agreement therein, finding that the fact that defendant entered into it after reviewing the ideas established that something of value had been transferred. The *Apfel* court held that if an idea is "fully disclosed" and the interested purchaser determines *after* such disclosure to enter into a contract for the exclusive right to purchase and exploit the idea, the contract could still be enforced under New York law in the absence of novelty. *Id.* at 1098.

The *Apfel* court took pains to reaffirm that the element of novelty was still required in New York in the classic idea submission case—like this case—where there is no issue of a "postdisclosure contract for *use* of the idea." 616 N.E.2d at 1098 (emphasis in original). Distinguishing *Downey* and the entire line of cases relied on by the district court in its original decision in this case,[5] the Court of Appeals explained that where the parties have expressly contracted after disclosure of the idea, "the question is not whether the buyer misappropriated property from the seller, but whether the idea had value to the buyer and thus constitutes valid consideration." *Id.*

In August 1993, Murray moved to vacate the district court's original 1987 judgment in this case on the basis of the *Apfel* decision. Despite the fact that the *Apfel* court made no suggestion that the district court or the Second Circuit had erred in their reading of New York law—and despite the fact that *Apfel* expressly distinguished its facts from idea submission cases such as this one—Murray argued that the *Apfel* decision demonstrated that the district court's grant of summary judg-

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[5] The string of idea submission cases, state and federal, applying the novelty requirement is unbroken. *See, e.g., Ferber* v. *Sterndent Corp.*, 412 N.E.2d 1311 (N.Y. 1980); *Soule* v. *Bon Ami Co.*, 195 N.Y.S. 574 (App. Div. 2d Dep't 1922), *aff'd*, 139 N.E. 754 (N.Y. 1923); *Ring* v. *Estee Lauder, Inc.*, 702 F. Supp. 76 (S.D.N.Y. 1988), *aff'd per curiam*, 874 F.2d 109 (2d Cir. 1989); *Woman Golfer, Inc.* v. *Meredith Corp.*, 792 F. Supp. 211 (S.D.N.Y. 1992); *Granoff* v. *Merrill Lynch & Co.*, 775 F. Supp. 621 (S.D.N.Y. 1991), *aff'd mem.*, 962 F.2d 2 (2d Cir. 1992).

ment and the Second Circuit's affirmance were contrary to New York law when they were issued and remain so now. On that faulty foundation, Murray erected the equally shaky assertion that Rule 60(b) afforded him the right to reopen the district court's six-year-old judgment and proceed apace to trial.

The Decision of the District Court

By Opinion and Order entered November 22, 1993, the district court denied Murray's motion for relief under Rule 60(b). 1993 WL 485584 (Pet. App. E). At the outset, the district court noted that "it is not clear that a motion under Rule 60(b) is either proper or timely." (Pet. App. E at 2)[6] Nonetheless, the court found that it was not necessary to resolve that question because Murray had failed to demonstrate any "new circumstances" to justify relief. (*Id.*) Analyzing the *Apfel* decision, the district court concluded that "Murray misreads *Apfel*." (*Id.* at 3) The district court correctly found that "the *Apfel* court carefully distinguished the facts before it from the 'idea submission' type of case brought by Murray," "expressly differentiat[ing] between the situation where the parties enter into a contract for use of an idea *after* full disclosure of the idea and those such as Murray's where there never was a post-disclosure contract for use." (*Id.* at 4, 6 (emphasis in original)) Accordingly, the district court held, *Apfel* did not change the law applicable to Murray's claims and thus it declined to award relief under Rule 60(b). (*Id.* at 7)

The Decision of the Court of Appeals

Murray appealed to the Second Circuit, arguing that the district court had abused its discretion in concluding that the *Apfel* decision did not constitute an "extraordinary develop-

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[6] Because Murray contended that the earlier decisions were incorrect, respondents had argued that he could only seek relief from judgment under Fed. R. Civ. P. 60(b)(1), which is subject to an absolute one-year time limit. Thus, his claim would be untimely even were it not otherwise meritless.

ment" sufficient to justify Rule 60(b) relief. On June 16, 1994, the Second Circuit summarily affirmed the district court's denial of Murray's Rule 60(b) motion. (Pet. App. B)[7] In an unpublished opinion (Pet. App. D), the Second Circuit noted that the *Apfel* court had found the contract at issue therein enforceable even if the plaintiffs' ideas were not novel and had expressly distinguished the line of New York authority requiring novelty, including its own 1988 opinion in this case. Thus, the Court of Appeals held: "[a]s the district court correctly noted, *Apfel* is not inconsistent with our prior decision in *Murray*, nor does it indicate that New York law has since changed." (Pet. App. D at 10)

The Second Circuit went on to state that even had *Apfel* been inconsistent with its 1988 decision in this case, the majority in that decision reasonably had construed New York's novelty requirement based on then-existing state court precedent. (Pet. App. D at 7-8) "[W]here the Second Circuit reasonably predicts how New York courts will rule on a question of state law, a subsequent decision by the New York Court of Appeals that is contrary to the Second Circuit's prediction does not constitute an 'extraordinary circumstance' under Rule 60(b)(6)." (*Id.* at 7) The Second Circuit found controlling its decision in *DeWeerth* v. *Baldinger*, Nos. 93-7144, 7146, 1994 WL 588440 (2d Cir. Oct. 27, 1994), *cert. denied*, 63 U.S.L.W. 3386 (U.S. Nov. 14, 1994), in which the court reversed a grant of Rule 60(b) relief from a federal judgment based on a subsequent New York Court of Appeals' decision. The Second Circuit noted that *DeWeerth* provided a much stronger case for Rule 60(b)(6) relief than this case did because there the New York Court of Appeals had explicitly ruled that the Second Circuit's earlier prediction of New York law in the *DeWeerth* case itself was incorrect, whereas here

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[7] The order of the Court of Appeals was issued as a mandate on September 6, 1994. (Pet. App. C) The appeal was decided by Chief Judge Newman and Judge Lumbard. Judge Oakes was originally assigned to hear the appeal but recused himself before oral argument thereof.

the Court of Appeals in *Apfel* had simply distinguished this case from the one before it.[8]

Petitioner sought rehearing of the order of summary affirmance contending, *inter alia*, that the determination of the appeal by two circuit judges after one judge recused himself prior to oral argument violated 28 U.S.C. § 46(b) (1988) and Second Circuit Local Rule § 0.14(b). The petition for rehearing was denied on August 12, 1994. 35 F.3d 45 (2d Cir. 1994) (Pet. App. A). Chief Judge Newman concluded that section 46(b) and its legislative history indicated that the statute was not intended to preclude disposition of an appeal by a two-judge panel where one judge becomes unable to participate, but only requires that appeals be assigned to three judges "in the first instance." 35 F.3d at 47 (Pet. App. A at 4-6). Thus, the Court of Appeals concluded, the fact that one judge originally assigned to hear plaintiff's appeal subsequently recused himself did not violate section 46(b).[9]

SUMMARY OF ARGUMENT

Parroting a list of factors that might warrant the exercise of this Court's jurisdiction in appropriate cases, Murray claims that the decision below conflicts with this Court's prior decisions, that it conflicts with the decision of the New York Court of Appeals, that it violates his constitutional rights and that it otherwise presents important questions of federal law.

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[8] Finally, the Court of Appeals held, correctly, that Murray had shown no basis for relief under Rule 60(b)(5) because, as was also the case in *DeWeerth*, the judgment from which Murray sought relief had no prospective application. Murray does not raise Rule 60(b)(5) in his petition as a basis for granting certiorari.

[9] Chief Judge Newman also found that Second Circuit Local Rule § 0.14(b) did not preclude the disposition of petitioner's appeal by two judges. 35 F.3d at 48. Murray does not claim in the petition that the determination of his appeal by a two-judge panel violated Local Rule § 0.14(b).

In truth, it does no such thing. It merely represents yet another effort by this disappointed litigant—who to date has filed three separate actions seeking an ownership interest in *The Cosby Show*—to relitigate claims that were fully and fairly litigated years ago.

First, Murray would have this Court abandon the "abuse of discretion" standard of review in favor of a *de novo* standard whenever an issue of state law is raised in support of a Rule 60(b) motion. Even had Murray not waived this point by failing to contest the standard in the court below, there is no sufficient basis for this Court to exercise its certiorari jurisdiction to consider a standard uniformly applied by all circuit courts of appeals in reviewing determinations under Rule 60(b).

Second, Murray contends that the decisions of the courts below are inconsistent with the New York Court of Appeals' decision in *Apfel*. What he is really saying is that the original decisions of the district court and the Second Circuit were wrong. Yet those decisions are clearly no longer subject to review. The only question presented to the court below was whether relief under Rule 60(b) was properly denied—which it was. Murray also asserts that the decision below conflicts with this Court's decision in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), and violates its "outcome determinative" test.[10] As the Second Circuit has correctly held, both in the opinion below and in *DeWeerth*, *Erie* requires only that federal courts apply state substantive law in a diversity case; it does not guarantee that federal courts will never misapply state law. Granting review in this case on such a basis would suggest that this Court's certiorari jurisdiction is properly invoked whenever a losing party in a diversity case discovers new

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[10] Indeed, this Court was recently asked to consider this same issue in *DeWeerth*, and declined to do so. *See* 63 U.S.L.W. 3386 (U.S. Nov. 14, 1994). *DeWeerth* presented an even stronger case for review because the subsequent state court decision there—unlike here—explicitly found the federal court's previous determination of state law to be incorrect.

authority in the controlling jurisdiction regardless of the length of time that has passed—a result that the need for finality of judgments precludes.

Third, and finally, the fact that Murray's appeal was decided by a panel of two judges did not violate 28 U.S.C. § 46(b), is not inconsistent with decisions of this Court, and otherwise presents no important recurring federal question that would justify expending this Court's resources to resolve.

REASONS FOR DENYING THE WRIT

I. THE APPROPRIATE STANDARD OF APPELLATE REVIEW WAS CORRECTLY APPLIED BY THE COURT OF APPEALS

Murray contends that the Second Circuit erroneously applied the "abuse of discretion" standard in reviewing the district court's denial of his Rule 60(b) motion and urges that this Court use this opportunity to adopt a *de novo* standard of review whenever an issue of state law is raised in support of a motion under Rule 60(b). Yet, Murray neglects to advise the Court that he failed to dispute the propriety of the "abuse of discretion" standard before the Second Circuit (in his briefs on the appeal or in his petition for rehearing)—indeed, he specifically cited that standard as the proper one in his brief to the court below.[11] It is well-settled that "[w]here issues are

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[11] Point I(A) of Murray's Brief on Appeal to the Second Circuit provided as follows:

> A. STANDARD OF REVIEW: ABUSE OF DISCRETION
>
> This Court reviews the denial of a motion brought pursuant to Rule 60(b)(5) and (6) by determining whether the district court has abused its discretion. *Negron* v. *Peninsular Navigation Corp.* 279 F.2d 859 (2d Circ. 1960). In the appeal at bar the order of the district court, which denied Murray's motion to vacate its prior orders and judgment, should be reversed because the district court abused its discretion. (Brief for Plaintiff-Appellant, dated February 3, 1994, at 12)

neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *EEOC* v. *FLRA*, 476 U.S. 19, 24 (1986) (per curiam) (Court "refrain[s] from addressing issues not raised in the Court of Appeals"). Murray's failure to contest—indeed, his endorsement of—the "abuse of discretion" standard renders certiorari unwarranted. *See, e.g., EEOC* v. *FLRA, supra*, 476 U.S. at 24 (dismissing as improvidently granted writ of certiorari presenting questions not raised in Court of Appeals).

Even had Murray not waived this argument by failing to raise it before the Second Circuit, there is no conflict among the federal courts regarding the appropriate standard of review nor is there any important question of federal law to be resolved by this Court. It is well-settled law that Courts of Appeal review denials of Rule 60(b) motions only for an abuse of discretion,[12] as this Court has recognized in dictum. *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978) (appeals from denials of Rule 60(b) motions reviewed "only for abuse of discretion").

Notwithstanding the unanimity of the Courts of Appeal on this issue, Murray asks this Court to discard this firmly-established standard in favor of *de novo* review where Rule 60(b) decisions involve determinations of state law. (Pet. at 22-23)[13]

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[12] *See, e.g., Baxter International, Inc.* v. *Morris*, 11 F.3d 90, 92 (8th Cir. 1993); *Fraige* v. *American-National Watermattress Corp.*, 996 F.2d 295, 297 (Fed. Cir. 1993); *Cotto* v. *United States*, 993 F.2d 274, 277 (1st Cir. 1993); *New Hampshire Insurance Co.* v. *Martech USA, Inc.*, 993 F.2d 1195, 1200 (5th Cir. 1993); *High* v. *Zant*, 916 F.2d 1507, 1509 (11th Cir. 1990), *cert. denied*, 499 U.S. 954 (1991); *Reinsurance Co. of America, Inc.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1277 (7th Cir. 1990); *Twelve John Does* v. *District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988); *Matarese* v. *LeFevre*, 801 F.2d 98, 107 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987).

[13] In so doing, Murray cites as authority *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991), an appeal from a denial of a motion for directed verdict involving a determination of state law claims. *Salve*

Rule 60(b), however, affords the district court "broad discretion" to grant or deny relief. *Reinsurance Co. of America, supra*, 902 F.2d at 1277. Accordingly, because Rule 60(b) relief is itself discretionary in nature, the Court of Appeals properly applied an "abuse of discretion" standard of review. *See Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988) (matters left to discretion of district court reviewable for abuse of discretion).

II. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR THE NEW YORK COURTS

Murray asserts that the New York Court of Appeals' decision in *Apfel* restated what he claims had been settled New York law prior to the decisions granting and affirming summary judgment in this case.[14] (Pet. at 25-26) As such, what Murray is actually urging is that the decisions of the district court and the Second Circuit more than six years ago—*not* the decisions below—were inconsistent with New York law and

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Regina is distinguishable from this case because, as Murray concedes, it is not a Rule 60(b) case. The district court there made a determination of state law in deciding a directed verdict motion which, this Court held, should have been reviewed by the Court of Appeals *de novo*. *Id.* at 231. In contrast, the district court here did not make a determination of state law but only determined whether petitioner had established grounds which, in the court's discretion, warranted relief from judgment under Rule 60(b). The fact that an examination of state court decisions was involved is irrelevant. To be sure, a determination of state law was made by the district court here when it granted summary judgment in 1987 dismissing petitioner's state law claims. Consistent with *Salve Regina*, the Second Circuit reviewed that decision *de novo*. *See Murray, supra*, 844 F.2d at 992-95 (Pet. App. J at 18).

[14] Murray mischaracterizes the *Apfel* decision as holding that an idea need only be novel as to the defendant. (Pet. at 26-27) As the Second Circuit correctly found, however, the statement relied on by Murray was in dictum and, at best, *Apfel* left the "novelty as to the buyer" issue unresolved. (Pet. App. D at 6)

therefore wrong. (*Id.* at 27) Murray made this argument the last time he petitioned this Court to review his case and it has long since been put to rest. The only issue that Murray may request this Court to consider is whether the courts below properly denied his request for relief from the earlier judgment under Rule 60(b)(6). As we demonstrate below, they did.

Even assuming that the earlier decisions misinterpreted then-existing New York law, the mere misinterpretation or error of law is not grounds for relief under Rule 60(b)(6).[15] If it were, the concept of finality would be meaningless. Indeed, both this Court and the Second Circuit have made clear that Rule 60(b)(6) simply cannot be used as a substitute for an appeal. *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950); *Cruickshank & Co.* v. *Dutchess Shipping Co.*, 805 F.2d 465, 468 (2d Cir. 1986); *Schildhaus* v. *Moe*, 335 F.2d 529, 531 (2d Cir. 1964).

Murray then makes the overarching assertion that the decision below conflicts with the doctrine set forth in *Erie R.R.* v. *Tompkins*. Murray's logic proceeds, as best as respondents can follow it, from the assumption that had he chosen to bring his action in state court (which he did not), he would have won. Inasmuch as he lost in federal court, what he calls the *Erie* "outcome determination" principle requires, *ipse dixit*, that he be relieved from the federal judgment.

At bottom, however, Murray's argument fundamentally misinterprets the holding in *Erie*. *Erie* does not seek to guarantee that the federal courts will never misapply state law. It merely requires that the federal courts apply state substantive law in a diversity case rather than a separate federal common law. The "outcome determinative" test is, of course, simply the means by which federal courts distinguish those issues that "so intimately affect recovery or non-recovery" that they

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[15] Such a claim must be asserted, if at all, under Rule 60(b)(1), which Murray did not raise and which, in any event, would be barred by the one-year time limit applicable to claims brought thereunder.

require reference to state substantive law from those issues that do not, as to which federal procedural law should properly be applied. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 110 (1945).[16] Here, as the Second Circuit recognized (Pet. App. D at 7), there is absolutely no suggestion that the district court or the Second Circuit did anything but faithfully look to state law for the rule of decision. That, according to Murray, they misread that rule of decision, simply does not implicate *Erie*.

Courts, federal and state alike, are daily faced with the task of interpreting and applying the laws of other jurisdictions without possible resort to the highest court in the controlling jurisdiction. Litigants do not get a second chance merely because some subsequent decision from the controlling jurisdiction suggests that there may have been a mistake.[17] *See DeWeerth*, 1994 WL 588440, * 7 ("There is nothing in *Erie* that suggests that consistency must be achieved at the expense of finality, or that federal cases finally disposed of must be revisited anytime an unrelated state case clarifies the applicable rules of law."); *Factors Etc., Inc.* v. *Pro Arts, Inc.*, 652 F.2d 278, 282 (2d Cir. 1981) (the fact that "a federal court's decision on state law cannot be corrected, for the benefit of the litigants in the particular case, by the state's authoritative tribunal" is the "price [that] must be paid" for diversity juris-

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[16] Murray misrepresents the holding of *Guaranty Trust Co.* v. *York* by deleting a material portion of a quote. (Pet. at 25) Murray quotes the case as stating: "[T]he outcome of the litigation in the federal court should be substantially the same . . . as it would be as if tried in a State Court." (*Id.*) The quotation actually reads: "[T]he outcome of the litigation in the federal court should be substantially the same, *so far as legal rules determine the outcome of a litigation*, as it would be as if tried in a State Court." 326 U.S. at 109 (emphasis added to show ellipsed material).

[17] In the end, Murray's *Erie* argument, like his others, proceeds from the faulty baseline assumption that *Apfel* demonstrates that the district court and the Court of Appeals erred in applying New York law. The decision in *Apfel* provides no foundation for such arguments and Murray's tortured effort to invoke the *Erie* doctrine in support of them is meritless.

diction), *cert. denied*, 456 U.S. 927 (1982). The Constitution requires *only* that courts attempt to apply other jurisdiction's laws properly, not that they must always succeed. *DeWeerth*, *supra*, 1994 WL 588440, * 7; *Factors*, *supra*, 652 F.2d at 281-82.

Murray proffers various policy arguments, presumably in an attempt to entice this Court to grant review given the absence of a clear legal basis to do so. He asserts that litigants should not have to bear the burden of erroneous determinations of state law by federal courts. Of course, Murray's policy argument on the "burden of error" incorrectly assumes that state courts are immune from error and that no such burden would exist there.[18] Moreover, every litigant who chooses a federal forum over a state forum knows full well that determinations of state law will be made by the federal court and, therefore, must bear this burden. *See DeWeerth*, 1994 WL 588440, * 6 (to hold otherwise "would be tantamount to holding that the doctrine of finality does not apply to diversity judgments").

Murray further argues that the need to correct erroneous decisions should outweigh the need for finality in litigations. He also tries to imply that this Court has instructed that finality is not as important as, *inter alia*, the prevention of forum

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[18] Even assuming that *Apfel* represented a change in New York law, it is noteworthy that even the courts of New York would decline to vacate an earlier state court judgment grounded in a differing interpretation of New York law. A change in law will not be applied in New York state courts "to actions and proceedings which had been finally determined and whose judicial life had then expired." *In re Adoption of Jessica "XX"*, 430 N.E.2d 896, 898 (N.Y. 1981), *aff'd sub nom. Lehr* v. *Robertson*, 463 U.S. 248 (1983). *See also, e.g.*, *People* v. *Pepper*, 423 N.E.2d 366, 369 (N.Y.) (change in law only applied to cases "still on direct review at the time the change in law occurred"), *cert. denied*, 454 U.S. 967 (1981) and 454 U.S. 1162 (1982); *Gager* v. *White*, 425 N.E.2d 851, 853-54 & n.1 (N.Y.) (new decisions applied to "cases still in the normal litigating process"), *cert. denied*, 454 U.S. 1086 (1981).

shopping.[19] (Pet. at 42) However, this court has often stressed the need for finality in judgments. As Justice Harlan warned in *Southern Pacific R.R.* v. *United States*, 168 U.S. 1, 49 (1897), if "conclusiveness did not attend the judgments of [judicial] tribunals" they would serve no purpose. *See also Nevada* v. *United States*, 463 U.S. 110, 129 (1983).

III. THE ADJUDICATION OF PETITIONER'S APPEAL BY A TWO-JUDGE PANEL WAS PROPER

Finally, Murray claims that the petition should be granted so that this Court can determine whether the adjudication of his appeal by a two-judge panel after one judge recused himself immediately before oral argument violates 28 U.S.C. § 46(b) (1988) and the "tradition" of three-judge panels recognized by this Court. (Pet. at 42-47) As Chief Judge Newman aptly stated, this merely "raises an institutional issue of court procedure", 35 F.3d at 46, and thus does not present an important or recurring federal issue sufficient to warrant the granting of a writ of certiorari.

Section 46(b) states, in pertinent part, that "[i]n each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges. . . ." As Chief Judge Newman recognized, the legislative history of section 46(b) demonstrates that it was not intended to preclude dispositions of appeals by two-judge panels where one judge becomes unable to participate prior to oral argument. 35 F.3d at 47 (citing S. Rep. No. 275, 97th

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[19] Petitioner asserts that the decision below "squarely conflicts" with *Erie*, which Murray misquotes as holding that " '[N]o lapse of time' should prevent a federal district court from 'correct[ing]' its prior *Erie* violations." (Pet. at 41 (citations omitted)) Contrary to Murray's implication, however, *Erie* admonished that an unconstitutional assumption of power by federal courts in *refusing to apply state law* must be corrected regardless of any "lapse of time" (*Erie*, *supra* 304 U.S. at 79-80). Here, petitioner does not allege that the district court refused to apply state law, but only that its application of state law was incorrect.

Cong., 1st Sess. 9 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 19).[20] Section 46(b) requires only that all appeals be assigned "in the first instance" to three-judge panels. *See* S. Rep. No. 275, *supra*; *Murray*, *supra*, 35 F.3d at 47. To hold otherwise would not only contravene the legislative history, but would deprive circuit courts of the flexibility and efficiency necessary to adjudicate cases without undue delay.[21]

Murray also contends that the use of a two-judge panel violates the "tradition" of three-judge panels recognized by this Court in *Western Pacific R.R.* v. *Western Pacific R.R.*, 345 U.S. 247, 256 (1953). The situation here is confined to infrequent and unanticipated situations and there is no reason to believe that the use of two-judge panels will become standard practice or will encourage judges to recuse themselves on the eve of oral argument. As Chief Judge Newman recognized, the use of two-judge panels in limited circumstances, while not the preferred method of adjudicating cases, nevertheless is warranted where assembling a three-judge panel would

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[20] The Senate's Report's identification of death and disability "does not preclude unavailability because of late-discovered disqualification." *Murray*, *supra*, 35 F.3d at 47.

[21] The Second Circuit's interpretation of § 46(b) is also consistent with § 46(d) which, in providing that "a majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum," contemplates the use of two-judge panels. *See* 35 F.3d at 47 (use of two-judge panels "is explicitly borne out by subsection 46(d)"); *Minniefield* v. *Alabama*, 542 F.2d 947 (5th Cir. 1976) (per curiam) (two-judge panel constituted quorum to hear case). Indeed, although petitioner is correct in asserting that a "quorum" is not a "panel," a quorum of two judges is all that is required under § 46(d) to hear and decide an appeal. *See Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 138 (1947) ("Two judges of a three-judge circuit court of appeals . . . ordinarily constitute a statutory quorum for the hearing and determination of cases.") To adopt petitioner's strict interpretation of § 46(b) would render § 46(d) meaningless, which clearly was not Congress' intent. *See, e.g.*, *Allen* v. *Johnson*, 391 F.2d 527, 529-30 (5th Cir. 1968) (per curiam) ("[I]t is not reasonable to suppose Congress desired or intended any such wasteful consequences.").

result in a waste of limited judicial resources. 35 F.3d at 48 (quoting *United States* v. *Glover*, 731 F.2d 41, 51 (D.C. Cir. 1984) (Mikva, J., dissenting) ("[A]s our dockets have become more full, a need for the efficient use of judicial resources has arisen, and . . . this quest for efficiency on occasion must be balanced against the need for judicial pluralism.")). Thus, for reasons of judicial economy, a two-judge panel was necessary and appropriate under the circumstances presented here and raises no issue warranting the grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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